Commissioner Geoffrey F. Brown, Dissenting:

For the reasons below, I respectfully dissent from the decision of the majority of my colleagues.

FACTS:

In Decision (D.) 03-12-058 (or "Decision") the Commission found Local 483 Utility Workers Union of America ("Local 483") eligible to request intervenor compensation under section 1804 of the Public Utilities Code. The Commission reached this conclusion by determining that Local 483 meets the statutory definition of "customer" pursuant to Public Utilities Code section 1802(b). The Commission also held that Local 483 demonstrated significant financial hardship according to Public Utilities Code section 1802(g). The Commission concluded that D.03-12-058 was in accord with the Commission's 1998 *Order Instituting Rulemaking of the Commission's Intervenor Compensation Program*; *Order Instituting Investigation on the Commission's Intervenor Compensation Program*, D.98-04-059, 1998 Cal. PUC LEXIS 429 (hereinafter referred to as "*Intervenor Compensation Order*").

Southern California Gas Company ("SoCalGas") filed Application (A.) 02-12-027 and San Diego Gas & Electric Company ("SDG&E") filed A.02-12-028 for authority to update their gas revenue requirement and base rates on December 20, 2002. The Assigned Administrative Law Judge ("ALJ") consolidated the two applications on January 22, 2003. The Commission initiated Investigation (I.) 03-03-016 for an order instituting investigation on the Commission's own motion into the rates, operations, practices, service and facilities of SoCalGas and SDG&E on March 13, 2003. These two applications and investigation are being handled together by the Commission in the same proceeding (hereinafter collectively referred to as "proceeding").

Local 483, as a party in this proceeding, filed a notice of intent to claim compensation ("NOI") on March 29, 2003 pursuant to intervenor compensation statutes, California Public Utilities Code sections 1801-1812 ("the Intervenor Compensation Statute" or "the statute"). Local 483 filed an Amended NOI on May 20, 2003 to update its itemized estimates of compensation.[1] In its NOIs, Local 483 states that it is a non-profit labor organization of 250 members who pay monthly dues, with no full-time staff, regular employees, or office clerical help. (Amended NOI, p. 3.)[2] Local 483 further notes that " . . . it has a long history of

[1] With the exception of updates of itemized estimates of cost, the two NOIs are virtually identical.

[2] Neither NOI has numbered pages. All citations are to unnumbered pages.

representing the interests of members who are employees and customers of California utilities." (Amended NOI, 2003, p. 1.) According to Local 483, it has collective bargaining rights granted by the National Labor Relations Act, but it does not have the right to compel discussion or negotiations about level of service to the ratepayers and costs of service for SoCalGas. (Amended NOI, p. 1.)

Local 483 declared that its concerns in this proceeding include:

> the level of service to the rate payers for the Transmission and Storage divisions of [SoCalGas]. It is very interested in exploring the effects that [Performance Based Rates] have on the level of service in the Transmission and Storage divisions of [SoCalGas]. Safe levels of service, environmental impact of the company's level of service, possible reduction of equipment and facility maintenance, efficient use of ratepayer's monies in relation to overlapping employment . . .

(Amended NOI, p. 2.) Furthermore, Local 483 stated that "[t]he consumers that it represents operate and maintain the Transmission and Storage facilities of [SoCalGas] [and that] [t]he participants have first hand knowledge of the level of service in these company divisions that cannot be obtained by others. (Amended NOI, p. 4.)

Southern California Edison ("SCE")[3] applied for rehearing of D.03-12-058 on January 23, 2004. SCE presents three arguments to support its contention that the Commission violated state law because it acted in excess of its authority: (1) Local 483 is not a representative organization because it does not represent people in their capacities as ratepayers; (2) Local 483 has not met the statutory standard for "significant financial hardship;" and (3) the Commission has unlawfully presumed labor unions eligible for intervenor compensation.

DISCUSSION:

I. SCE's Argument that Local 483 is Not a Customer under the Intervenor Compensation Statute.

SCE claims that D.03-12-058 violates state law because the Commission acted in excess of its authority in finding that Local 483 is a customer pursuant to the three definitions of customer in §1801-1812. (App. for Rehearing, pp. 3, 4.) It provides that in order to be eligible for intervenor compensation, a participant must qualify under one of the following three definitions of customer:

[3] SCE filed a motion to intervene on January 29, 2003.

A. A participant representing consumers, customers, or subscribers of any electrical, gas, telephone, telegraph, or water corporation that is subject to the jurisdiction of the commission (hereinafter "Category 1 customer").
B. A representative who has been authorized by a customer (hereinafter "Category 2 customer").
C. A representative of a group or organization authorized by its articles of incorporation or bylaws to represent the interests of residential customers, or to represent small commercial customers who receive bundled electric service from an electrical corporation (hereinafter "Category 3 customer").

(Pub. Util. Code, § 1802(b).) According to SCE, there is no legal basis for the Commission's determination that Local 483 qualifies as a customer for purposes of intervenor compensation. (App. for Rehearing, p. 4.) Because the Commission held in its Decision that Local 483 did not meet the standard to establish significant financial hardship that corresponds with the first two definitions of customer under the Intervenor Compensation Statute, Local 483's status under the third definition of customer will be addressed first.

A. Category 3: A Representative of a Group or Organization that is Authorized by its Bylaws or Articles of Incorporation to Represent the Interests of Residential Ratepayers.

SCE contends that the Commission acted in excess of its authority by determining that Local 483 is Category 3 customer. SCE claims that neither Local 483's Constitution nor the Utility Workers Union of America's ("UWUA") Constitution contains language indicating that either represents the interests of residential customers, as required to be deemed a Category 3 customer. (App. for Rehearing, p. 7.) In particular, SCE argues that the "[b]y finding that 'working for social and economic justice' is a sufficient nexus for compensation, the Commission has essentially found any organization eligible for intervenor compensation." (App. for Rehearing, p. 8.) SCE also challenges the Commission's interpretation of the *Intervenor Compensation Order* in the Decision, where the Commission stated that it has "'has a long-established practice of finding organizations eligible under [C]ategory [3] who are presumed by the Commission to promote broad interests." (App. for Rehearing, p. 8; D.03-12-058, *mimeo*, p. 9.) SCE's arguments are persuasive.

In D.03-12-058, the Commission found that the Constitution of the UWUA "expressly provides for regulatory and other forms of advocacy on behalf of its members and other working people," and therefore Local 483's members may expect either union to represent them broadly, including representation before the Commission. (D.03-12-058, pp. 8-9.) The Commission reached this

determination despite the fact that Local 483 did not claim in its NOI that it is a Category 3 customer, and did not present any record evidence to the Commission regarding such a claim.[4] This runs contrary to the requirements in the Intervenor Compensation Statute and the *Intervenor Compensation Order*, which provides that "[a] group or organization should provide a copy of its articles or bylaws, noting where in the document it is authorized to represent the interest of residential ratepayers" and show that the majority of its membership is comprised of residential ratepayers in order to qualify as a Category 3 customer.[5] (*Intervenor Compensation Order*, 1998 Cal. PUC LEXIS at Finding of Fact 12 at *149 and Conclusion of Law 5 at *157-158.) Local 483 did not meet any of these requirements.[6]

The Commission based its conclusion that Local 483 is a Category 3 customer on its reasoning that it ". . . has a long-established practice of finding organizations eligible under [C]ategory [3] who are presumed by the Commission to promote broad public interests . . . [and] [t]he Commission's objective in providing intervenor compensation is to provide for as broad a platform as possible for consumers to have meaningful input into our complex regulatory processes." (D.03-12-058, *mimeo*, at p. 9.) In adopting such a broad definition of Category 3 customer, the Commission's decision impliedly admitted that Local 483's own Constitution does not provide Local 483 with the authorization "to represent the views of residential customers."

SCE is correct in asserting that the language of UWUA's Constitution does not provide a sufficient justification to support the finding that Local 483 is a

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[4] Although the Commission stated in D.03-12-058 that "it is undisputed that among Local 483's members are residential customers" of SDG&E and SoCalGas," *there is no record evidence to support this statement*. (D.03-12-058, *mimeo*, p. 6.) Local 483 did not quote relevant portions of its Constitution showing that it is authorized to represent interests of residential customers, nor did it submit copies of its bylaws or articles.

[5] For an example of such a showing, *see* R.01-08-027, ALJ Ruling Addressing Eligibility for Compensation Award, March 29, 2002, p. 3 (holding that "[t]he by-laws of Joint Intervenors authorize them to represent the interests of residential ratepayers before state and regulatory agencies and in court. Latino Issues Forum estimates that its members represent a constituency which is divided 85-15% between residential and small business customers, respectively. For the Greenlining Institute, the division is estimated to be 75-25%").

[6] Permitting Local 483 to use UWUA's Constitution to qualify as a Category 3 customer is also problematic because UWUA and Local 132 (a UWUA union that is also an intervenor in this proceeding) could potentially late-file NOIs in this proceeding. (Pub. Util. Code, § 1804(a)(1).) If UWUA, Local 132 and Local 483 base their eligibility for intervenor compensation on UWUA's Constitution, the Commission would be unable to find them all eligible and <u>not</u> violate certain anti-duplication provisions of the Intervenor Compensation Statute. (*See* Pub. Util. Code, § 1801.3(f).)

Category 3 customer. The preamble to UWUA's Constitution states, in relevant part, that to accomplish its goals, UWUA commits to:

> Bargain contracts that provide for improved wages and working conditions and insure that our collective voices are heard and honored; Building a strong and unified union, that also stands firm with other unions; Organize the unorganized workers in our industries so that all workers can enjoy the highest possible level of wages, pensions and benefits; Stay united and recognize our common ground and goals and not be divided by forces of discrimination, corporate action or disharmony; Participate in our democratic society and insure that unions maintain a vital and central role in the political, social, and economic life of our country; Work for social and economic justice; Leave the workplace a better place for our children and our children's children.[7]

Thus, the preamble of UWUA's Constitution *does not* "expressly provide[] for regulatory and other forms of advocacy on behalf of its members and other working people," as the Commission alleged in the Decision. (D.03-12-058, *mimeo*, p. 8.)[8]

Likewise, Local 483's Constitution does not refer to the interests of utility customers or those members of Local 483 who are utility customers. Local 483's Constitution defines its purpose as a labor union organization, stating, for example, that its objective is to "protect, maintain and advance the interests of the workers, to improve working conditions, and to secure adequate remuneration for its members." (Local 483 Constitution, Article II, § A.)[9] Although the interests of Local 483 and utility customers may overlap in some cases, this is true of many

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[7] UWUA Constitution, pp. 2-3 at http://www.uwua.org/newpage8.htm.

[8] The introductory portion of the preamble states:

"The Utility Workers Union of America, AFL-CIO is an organization of members united by the belief in the dignity and worth of workers, but the value of the services we provide to the public and dedicated to improving the lives of our members and their families.

We are an organization of men and women of every race, religion, age, and ethnicity, who are committed to a society where all workers and their families live and work with dignity; where there is an economic and political mandate for a more equitable distribution of the nation's wealth for all those performing useful service to society; where workers have a collective voice and power at the workplace; where economic well being is achieved for our members and all workers; where work is satisfying and fairly rewarded. (Preamble of UWUA Constitution.)

[9] The Decision references a web address to Local 483's Constitution, however that web address is no longer valid. (*See* D.03-12-058, *mimeo*, p. 7, fn. 4.)

intervenors, *including the utilities themselves*.[10] The Intervenor Compensation Statute's explicit requirement [§1802(b)(1)(C)] that an organization seeking to represent the *interests* of residential or small commercial customers must have an authorizing provision in its by-laws or articles *only* can be interpreted reasonably as a legislative intent to restrict the provision of intervenor fees to entities whose concern with utility regulation is not attenuated from its main purpose. If Local 483 were not composed of utility employees and its charter were a broad-based commitment to the welfare of its members in every sphere of endeavor, explicitly *including* the utility rates of its members, it might be arguable that it were not barred from such compensation. This is not the case here.

The Decision maintains that the words "work for social and economic justice" in UWUA's statement of goals rises to the level of authorizing Local 483 to represent the views of residential customers.[11] This reasoning is, in my opinion, both pretextual and flawed. Neither Local 483's nor UWUA's Constitution mentions or otherwise alludes to the economic concerns of ratepayers. Rather, these Constitutions are structured and revolve around the fact that Local 483 is a union labor organization, and not an organization that has interest in the economic concerns of ratepayers.

SCE is concerned that the Commission's holding that "working for social and economic justice" is sufficient reason to be eligible for intervenor compensation renders §1801-1812 largely meaningless. The primary goal of statutory interpretation is to determine the legislative intent in order to effectuate the statute's purpose.[12] Therefore, the Commission's objective in determining whether Local 483 is a customer under the Intervenor Compensation Statute is to ascertain and effectuate legislative intent.

The language of the Intervenor Compensation Statute is clear and unambiguous. It provides for three definitions of customer, and a participant seeking intervenor compensation must fall within one of those definitions to be deemed eligible for intervenor compensation. Furthermore, Public Utilities Code §1801 states the statute's purpose "is to provide compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to

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[10] *See* R.01-08-028, ALJ Ruling Denying Request of the Building Industry Institute ("BII") for a Finding of Eligibility, May 16, 2003 (holding that BII's bylaws do not refer to the interests of utility customer or "even those who ultimately purchase homes and buildings and become utility customers" . . . and "[a]lthough the interests of BII and utility customers may overlap in some cases, this is true of many intervenors, including the utilities themselves").

[11] The Commission recognized that "[w]orking for social and economic justice is a very generalized objective . . . ." (D.03-12-058, *mimeo*, p. 9.)

[12] *People v. Murphy* (2001) 25 Cal. 4th 136, 142; *People v. Cruz* (1996) 13 Cal. 4th 764, 774-775.

public utility customers of participation or intervention in any proceeding of the commission." The subsequent intent section of the statutes states, in relevant part, that it is the intent of the Legislature that "(b) This provisions of this article shall be administered in a manner that encourages the effective and efficient participation of all groups that have a stake in the public utility regulation process . . . [and] (f) This article shall be administered in a manner that avoids unproductive or unnecessary participation that duplicates the participation that is not necessary for a fair determination of the proceeding." (Pub. Util. Code, § 1801.3.)

SCE appears to be correct that in D.03-12-058, the Commission violated the principles of statutory construction because its interpretation of the Intervenor Compensation Statute cannot be harmonized with its plain language. The Commission's overly broad interpretation of those provisions essentially renders meaningless the eligibility hurdles set forth therein. It signifies that virtually any participant can be eligible for intervenor compensation, a gargantuan leap from past Commission decisions and ALJ rulings concerning eligibility.[13] The plain language of the statute reveals that in order to qualify as a Category 3 customer, a participant must rely on its own bylaws or Articles of Incorporation.

Even if the definition of customer in the statute were ambiguous, the legislative history makes it clear that the purpose of the three definitions of customer is to limit who may be eligible for intervenor compensation.[14] In fact, the 2003 amendments to the statute specifically targeted the format of the definition of customer. Before the changes, the three definitions of customer were

[13] Prior Commission rulings have required organizations that are founded on and exist to promote a broader policy basis to show that their member's interests included legitimate and unbiased concern for the adoption of cost-effective measures, or would benefit ratepayers in some concrete fashion. For example, the Sierra Club has been found eligible for intervenor compensation as a Category 3 customer because its "articles of incorporation specifically authorize the representation of the public interest, and many members of the Sierra Club reside in the service area" of the utility at issue in that proceeding. (A.02-05-013, ALJ Ruling on NOI, dated August 28, 2001, p. 3.) Also, Greenlining Institute and Latino Issues Forum (Joint Intervenors) have been found eligible as a Category 3 customer because the "by-laws of Joint Intervenors authorize them to represent the interests of residential ratepayers before state and federal regulatory agencies and in court." (I.01-08-027, ALJ Ruling Addressing Eligibility for Compensation Award, dated March 29, 2002, p. 3.) Joint Intervenors also provided the Commission with an estimate of the percentage of its members that are ratepayers.

[14] The California Supreme Court has found that the Intervenor Compensation Statute is the Commission's only source of authority to grant intervenor compensation awards. (*See Consumers Lobby Against Monopolies v. Public Util. Comm'n* (1970) 25 Cal. 3d 891, 911-912; *Southern California Gas Co. v. Public Util. Comm'n* (1985) 38 Cal. 3d 64, 66.)

listed in one paragraph.[15] The 2003 amendments clarified that there are three distinct definitions of customer by providing a subsection for each definition. Had the Legislature intended the definition of customer to be as broad as the Commission adopts in this Decision, it would not have included three distinct categories of customer in the Intervenor Compensation Statute.

SCE's challenge of the Commission's interpretation of the *Intervenor Compensation Order* also has merit. The *Intervenor Compensation Order* did not hold, as the Commission states in D.03-12-058, that the Commission should find organizations "who are presumed by the Commission to promote broad public interests" eligible as a Category 3 customer.[16] (D.03-12-058, *mimeo*, at p. 9.) Under the Commission's interpretation in D.03-12-058, virtually *any* organization would be eligible for intervenor compensation. This is not only problematic because it is an inaccurate interpretation of the *Intervenor Compensation Order* and it contradicts the statute's eligibility requirements, but also because ratepayers to whom this body owes its primary obligation ultimately foot the bill for intervenor compensation.[17] The *Intervenor Compensation Order* requires environmental groups to have more than just a concern for the environment in order to be considered a customer. D.03-12-058 erred in expanding the scope and intention of the *Intervenor Compensation Order* in finding that Local 483 is a Category 3 customer. Rehearing should have been granted to deny Local 483 eligibility based on the determination that it is a Category 3 customer.

B. Category 1: A Participant Representing Consumers or Customers.

SCE also argues in its application for rehearing that Local 483 does not qualify as Category 1 customer. According to SCE, Local 483 does not meet the

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[15] *See* Pub. Util. Code, §§ 1801 – 1804 (Amended or Added by Stats. 1992, Ch. 942 (AB 1975); Stats. 1993, Ch. 590, § 135 (AB 2211); Stats. 2003, Ch. 300, § 2 (SB 521).) The 1993 and 2003 amendments did not substantively change any portion of Article 5 at issue in this rehearing.

[16] In the relevant portion of the *Intervenor Compensation* Order, the Commission stated: "With respect to environmental groups, we have concluded they were eligible in the past with the understanding that they represent customers whose environmental interests include the concern that, e.g., regulatory policies encourage the adoption of all cost-effective conservations measures and discourage unnecessary new generating resources that are expensive and environmentally damaging. They represent customers who have a concern for the environment which distinguishes their interests from the interests represented by Commission staff, for example." (D.98-04-059, 1998 Cal. PUC LEXIS 429 at *49, fn. 14.)

[17] *See* I.02-04-026, ALJ Ruling Approving the Requests of Consumers Union of U.S., Inc., Aglet Consumer Alliance, and the Greenlining Institute and Latino Issues Forum to Be Found Eligible for Compensation, dated August 20, 2003 (cautioning that "any award of compensation is to be reimbursed by the ratepayers and it is the Commission's duty to protect the ratepayers' interests").

threshold requirement that it be "an actual customer who represents more than his own narrow-self interest" in order to qualify as a Category 1 customer. (App. for Rehearing, p. 4 (*quoting* D.98-04-059, 1998 Cal. PUC LEXIS 428, *48.) SCE contends that the Intervenor Compensation Statute requires a "narrow construction" of this definition of customer, "[o]therwise, the definition . . . becomes so broad as to render meaningless the two additional descriptions of a 'customer' that follow." (App. for Rehearing, pp.4-5 (*quoting* D.86-05-007, 1986 Cal. PUC LEXIS 287 at *4).) SCE also claims that Local 483 only represents its own partisan economic interests. (App. for Rehearing, p. 5.)

SCE has raised some valid points. In D.03-12-058, the Commission found that "Local 483 is a 'self-appointed representative' in the sense that its participation on behalf of its members as customers may represent more than the 'narrow self-interest of its members as consumers.'"[18] (D.03-12-058 at 6-7 (*quoting Intervenor Compensation Order*, 1998 Cal PUC LEXIS 429 at *47).)

It is my opinion that the Commission erred in reaching this conclusion. Pursuant to the statute and the *Intervenor Compensation Order*, if a participant claims to be a Category 1 customer, that participant must describe how his participation goes beyond its self-interest and benefits other customers generally. Local 483 did not provide any such description.[19] In fact, Local 483 did not claim in its NOI that some of its members may incidentally be residential customers of SoCalGas or SDG&E as the Commission determined in D.03-12-058. Clearly, Local 483 did not make the required showing to be eligible for intervenor compensation as a Category 1 customer.

Moreover, the Commission's reliance on the *Intervenor Compensation Order* in reaching the conclusion that Local 483 is a Category 1 customer is misplaced. The *Intervenor Compensation Order* requires that a Category 1 customer be an *actual customer* who represents more than his own narrow self-interest; a self-appointed representative." (*Intervenor Compensation Order*, 1998 Cal. PUC LEXIS 429 at *48.) However, D.03-12-058 only states that "Local 483's . . . participation on behalf of its members as customers **may** represent more than the narrow self-interest of its members as consumers." (D.03-12-058,

[18] The Commission's quotation of the exact language of the *Intervenor Compensation Order* in D.03-12-058 is inaccurate, but its meaning is nonetheless the same.

[19] The only evidence that Local 483 made in its NOI to show it qualifies as a Category 1 customer are the following *conclusionary* statements: "as a 'participant representing consumers,' it believes it qualifies as a customer pursuant to § 1802(b)" (Original and Amended NOIs, p.1); and "As a participant representing consumers who are also employees of Sempra and The Southern California Gas Company, Local 483 will make a substantial contribution to the proceedings." (Original and Amended NOIs, p. 4.)

mimeo, pp. 6-7 (emphasis added).) The *Intervenor Compensation Order* requires more than unsupported conclusions to meet this requirement.

SCE's contention that the Commission's interpretation of the Intervenor Compensation Statute is so broad as to render the statute meaningless also has merit. Because Local 483 did not claim into be an actual customer of SoCalGas or SDG&E, Local 483 cannot be deemed a Category 1 customer under the plain meaning of the statute.

SCE further claims that Local 483 only represents its own partisan economic interests. Local 483 provided a list of reasons that it wished to be a participant in the proceeding in its NOI.[20] However, these reasons may contradict Local 483's purpose, as evidenced in its Constitution and Local 483's Constitution, which indicate that the purpose of these organizations is to promote the self-interest of the employee members of Local 483 who may wish to ensure their continued employment, to improve personal working conditions and wages, or to increase staff levels, which would mean a larger membership base for the union.[21] The sole purpose of intervenor compensation is to allow under-represented residential customers to participate in Commission proceedings, and by these terms Local 483 does not fit this description.

While it is not always the case, as a general rule, a utility employee union's interest in benefiting its membership is adverse to the interests of ratepayers. The conflict between capital, labor, and consumers for finite resources is often a zero-sum game. Employees' interests in better compensation and working conditions create an inherent tension with ratepayers' interests in lower rates. Whether that tension, under circumstances such as these involving a utility workers' organization, is fatal to *representation* of ratepayers' interests by an adverse entity is a decision that can be made by this Commission only after careful consideration of the adverse interests. Historically, we have made such representation decisions on a case by case basis, in recognition that facts often trump even the safest

[20] Specifically, Local 483 stated, in part, that it is "particularly interested in the level of service to the rate payers in the Transmission and Storage decisions of [SoCalGas]. It is very interested in exploring the effects that PBR . . . have on the level of service in Transmission and Storage divisions of [SoCalGas]." (Amended NOI, May 20, 2003, p. 2.)

[21] Local 483's Constitution states that its purpose is to "protect, maintain and advance the interests of the workers, to improve working conditions, and to secure adequate remuneration." (Local 483 Constitution, Article II, § A.) These goals are potentially in conflict with the interests of ratepayers as matters unfold in public utility regulatory proceedings. The terms of its Constitution are clearly and solely focused on labor relations with an employer. Local 483's interests contrast sharply with the clear objectives of The Utility Reform Network (TURN), Aglet Consumer Alliance (Aglet), and others, which are organized primarily to represent small customers.

generalization. In my opinion, our blithe failure to recognize the inherent problem raised in this case, and thereafter rigorously examine it, does a manifest disservice to the legislative purpose underlying the Intervenor Compensation Statute.

While Local 483's participation in this proceeding may turn out to be nothing more than an attempt to represent its own partisan economic interests, this is something that may be determined when Local 483 makes its request for an award following the issuance of a final decision by the Commission. [*See* Pub. Util. Code, § 1804(c)]. It is not a proper basis upon which to grant rehearing.

For the aforementioned reasons, it is my opinion that the Commission committed legal error in concluding that Local 483 is a Category 1 customer, and therefore, rehearing should have been granted and the Decision modified to deny eligibility on this ground.

C. Category 2: A Representative Authorized by a Customer.

SCE contends that the Commission erred in determining that Local 483 is a Category 2 customer. SCE contests this finding on the ground that Local 483 did not provide evidence in its NOI that it has been selected by any ratepayer to represent ratepayer interests, as required by the statute and the *Intervenor Compensation Order*. (App. for Rehearing, p. 6.) SCE further argues that Local 483 is not an organization specifically authorized to represent ratepayer interests. (App. for Rehearing, p. 7.) SCE has raised issues that have merit.

In D.03-12-058, the Commission held that "Local 483's authority to act on behalf of its members in a regulatory setting is also pursuant to the specific express agreement or authorization of its members who are residential customers, under category [2] above," despite the fact that Local 483 did not present this alternative in its NOI. (*Id.*, p. 8.) The Commission appears to have based its conclusion on Local 483's statement that it is a non-profit labor organization of 250 members who pay dues, and on its determination that Local 483's Constitution states that it has jurisdiction over those employees it is authorized to represent. (D.03-12-058, *mimeo*, p. 8; Amended NOI, p. 3.)

The Commission's ruling that Local 483 is a Category 2 customer is in my opinion clearly erroneous. The Intervenor Compensation Statute and the *Intervenor Compensation Order* mandate that those claiming to be a Category 2 customer "identify in his Notice of Intent the residential customer or customers that authorized him to represent that customer." (Pub. Util. Code, § 1802(b)(1)(B); *Intervenor Compensation Order*, 1998 Cal. PUC LEXIS 429 at *52.) Local 483 did not claim that it was a Category 2 customer in its NOI, nor did Local 483 identify the residential customer that authorized it to represent it.

Furthermore, Local 483's Constitution does not contain language that supports a claim that it is a "representative specifically authorized by a customer." In D.03-12-058, the Commission relied on the following language to support its determination that Local 483 is a Category 2 customer: "The organization shall be known as Local 483 of the Utility Workers Union of America, AFL-CIO, with jurisdiction over those employees of Pacific Enterprises who, by agreement, certification or other means it is authorized to represent." (Local 483 Constitution, Article I, § A.) According to the *Intervenor Compensation Order*, " [a] 'representative authorized by a customer' connotes a more formal arrangement where a customer, or a group of customers, selects a presumably more skilled person to represent the customers' views in a proceeding." (*Intervenor Compensation Order* at *48.)

It seems clear that Local 483's Constitution does not meet the standard set forth in the statute and the *Intervenor Compensation Order* to be eligible for intervenor compensation as a Category 2 customer because the terms of Local 483's Constitution are focused solely on labor relations with an employer. Furthermore, Local 483 did not provide any documentation to show that its members wanted, authorized, and expected ratepayer representation required under Category 2 of section 1802(b).

Because the Commission's determination that Local 483 is a Category 2 customer does not comply with the plain language of the statute, I believe the Commission should have granted rehearing and denied Local 483's eligibility on this ground.

D. Summary of Customer Status.

The Commission's determination that Local 483 qualifies as a customer under Categories 1, 2 and 3 is not supported by the record, case law, or the Intervenor Compensation Statute. Local 483 is not similar to the environmental and consumer groups that the Commission has found eligible for intervenor compensation in the past, e.g., Sierra Club, NRDC, Aglet and Turn. All of those organizations provided the Commission with bylaws that contained more specific language providing that the organization could represent the interests of ratepayers. The key purpose of the intervenor compensation statutes is to allow under-represented residential customers to participate in Commission proceedings. Clearly as a matter of proof and probably as a matter of law, Local 483 does not fit this description.

Moreover, the typical retail customer is not eligible to join Local 483 in the same manner that a customer might decide to join or subscribe to Sierra Club,

TURN, NRDC, or Aglet. Both Local 483's and UWUA's Constitutions restrict membership to those "employed in and around energy, electric, gas, steam, water, telecommunications, generation, service and relation industries and organizations . . . ." (UWUA Constitution, Article III, § 1.) Local 483's membership restrictions are at odds with the Commission's stated intent in the *Intervenor Compensation Order* that "compensation may be proffered only to customers whose participation arises directly from their interests as customers." (*Intervenor Compensation Order*, D.98-04-059, 1998 Cal. PUC LEXIS 429.) Because Local 483's interest arises directly from its members' interests as employees of the utility and nothing in its Constitution specifically authorizes it to represent the interests of residential ratepayers, it cannot be considered a Category 3 customer. While the Commission emphasized in D.03-12-058 that it has increasingly expanded the interpretation of the intervenor statutes, this must be balanced by the fact that ultimately, utility ratepayers pay for awards of compensation because the Public Utilities Code allows rates to be adjusted to collect the amount of compensation awarded.

While it is true that California courts afford the Commission much deference in reviewing intervenor compensation decisions (*Southern Cal. Edison Co. v. Public Utils. Comm.* (2004) 117 Cal. App. 4th 1039.), such deference is hardly unlimited. The court stated that it "must also consider and afford considerable deference to the PUC's interpretation of the statute because . . . the 'PUC's interpretation of the Public Utilities Code 'should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language.'" (117 Cal. App. 4th, p. 1050 (*quoting Southern Cal. Edison Co. v. Peevey* (2003) 31 Cal. 4th, 781, 796 (*quoting Greyhound Lines Inc. v. Public Utils. Comm.* (1968) 68 Cal. 2d, 406, 410-411)).)

However, in this case, SCE has a persuasive argument that the Commission's interpretation of the Intervenor Compensation Statute does not bear a reasonable relationship to its statutory purpose and language. As the Second District Court of Appeal recently noted, the purpose of the Intervenor Compensation Statute is to obtain a "*customer* perspective on matters before the PUC," (emphasis added) and to allow under-represented customers, who do not have the funds to cover the costs of being a participant in the proceeding, to obtain intervenor compensation for their efforts if they met certain criteria. (*SCE v. CPUC, supra*, 117 Cal. App. 4that 1052.) The Decision contravenes that purpose because the Commission interpreted the statute so broadly in D.03-12-058 that essentially *any* participant could gain customer status and obtain intervenor compensation, so long as it could show significant financial hardship. Even if SCE does not appeal the Decision, or loses an appeal of the Decision, D.03-12-058 sets a potentially dangerous precedent in opening the door to intervenor compensation by virtually any participant. Not only does this Decision violate the intent of the Intervenor Compensation Statute, but it

also likely violates the Commission's mandate to act in the best interests of consumers of regulated utilities in California.

II. Significant Financial Hardship

SCE claims that Local 483 did not meet the statutory definition of "significant financial hardship" in D.03-12-058. SCE contends that Local 483 has failed to "provide any evidence indicative of its financial resources," and therefore, cannot make a showing of significant financial hardship. (App. for Rehearing, p. 10.) In particular, SCE notes that Local 483 did not provide any evidence to "suggest the amount, even generally, of any individual Local 483's member's economic interest in this proceeding." (App. for Rehearing, p. 11.) SCE also asserts that Local 483 failed to "quantify how much its planned participation . . . [on the issues it raised] . . . will benefit ratepayers." (App. for Rehearing, p. 10.)

The statue provides that significant financial hardship is "either that the customer cannot afford, without undue hardship, to pay the costs of effective participation . . . or that, in the case of a group or organization, the economic interest of the individual members of the group or organization is small compared to the costs of effective participation in the proceeding." (Pub. Util. Code, § 1802(g).) In the *Intervenor Compensation Order*, the Commission clarified the bifurcated approach to establishing a significant financial hardship. For Categories 1 and 2 of the definition of customer, the standard that must be met is "cannot afford to pay." (*Intervenor Compensation Order*, D.98-04-059; 1998 Cal. PUC LEXIS 429 at *58.) This standard requires a customer to provide detailed financial information, under seal, for Commission review. (*Id.* at *61-62.) Those who seek eligibility for intervenor compensation pursuant to Category 3 may use a "Comparison Test": the cost of participation is compared to the economic interests of the individual members of the organization. (*Id.* at *58, *158, Conclusions of Law 6 & 7.) The Commission has construed this test as presenting a lesser "eligibility hurdle" for groups than for individuals. A participant may present a showing of significant financial hardship in its NOI, or in its request for compensation at the end of the proceeding. (*See* Pub. Util. Code, § 1804(a)(2(B).) Local 483 elected to make this showing in its NOI.

In the Decision, the Commission determined that Local 483 did not make an appropriate showing for the "cannot afford to pay" standard in order to be eligible as a Category 1 or 2 customer because Local 483 did not provide detailed financial information for Commission review as required to meet this standard. (D.03-12-058, *mimeo*, p. 11). However, the Commission found that Local 483 met the requirements of the "Comparison Test," and therefore, was eligible as a Category 3 customer. In making this determination, the Commission stated that:

> The proposed budget for participation described below is several orders of magnitude larger than the annual cost for an average residential ratepayer of SDG&E or SoCalGas. Since Local 483 is acting as a representative of its members in their capacities as residential ratepayers, this is a sufficient showing to establish financial hardship under § 1802(g). We will not require any further detail of individual members' utility bills.

(D.03-12-058, *mimeo*, p. 12.) As previously discussed in this memorandum, the Commission erred in determining that Local 483 is a Category 3 customer under §1802(b)(1)(C). Therefore, the discussion of significant financial hardship in the Decision is unnecessary. It is my belief that this Category 3 economic analysis is too cursory to afford any meaningful guidance under the statute. While I'm inclined to believe that there was an insufficient showing here, and that alone probably should disqualify Local 483, I do believe as an abstract matter that a 250-person organization of working class, residential ratepayers would be hard-pressed to finance a protracted evidentiary hearing without significant financial hardship. Had Local 483 made the requisite showing, and were it not disqualified for other reasons, I strongly suspect it could have demonstrated financial hardship within the meaning of §1802(g).

III. Union Presumption

SCE's final argument in its application for rehearing is that the Intervenor Compensation Statute does not allow the Commission to adopt the presumption that the customer status of all labor organizations representing utility customers will be presumed in future Commission proceedings. (App. for Rehearing, p. 12.) SCE specifically objects to the following language in the Decision:

> Unions representing utility employees may therefore be "customers" if they are the proponents of positions and issues that affect adequacy or quality of service, under the established precedents of the Commission, even if they do not advance "traditional" consumer positions regarding control of cost and rate levels. Of course, where they do advance rate and cost-related issues on behalf of their members as consumers or consumers generally, they are eligible as "customers" without more justification.

(D.03-12-058, *mimeo*, p. 6; *see also* App. for Rehearing, p. 12.) SCE contends that there is no legal basis for the Commission's presumption that labor unions are eligible for intervenor compensation. (App. for Rehearing, p. 12.) SCE's arguments have merit.

The Intervenor Compensation Statute, the *Intervenor Compensation Order*, and past Commission decisions indicate that Commission should make eligibility determinations for intervenor compensation on a case by case basis. SCE is correct that neither the statute nor the *Intervenor Compensation Order* provide for a blanket statement of eligibility for a particular group or type of organization. There appear to be only two presumptions that are allowed. First, under the statute, "a finding of significant financial hardship shall create a rebuttable presumption of eligibility for compensation in other commission proceedings commencing within one year of the date of that finding." (Pub. Util. Code, § 1804(b)(1).) Second, with regard to Category 3 customers "[i]f current articles or bylaws have already been filed, the group or organization need only make a specific reference to such filing." (*Intervenor Compensation Order*, D.98-04-059; 1998 Cal. PUC LEXIS 429 at *52, fn. 16.)

Neither the statute nor the *Intervenor Compensation Order* explicitly prohibits the Commission's action. However, applying the rules of statutory construction to the statute, and considering the "entire substance of the statute . . . in order to determine the scope and purpose of the provision," the plain meaning of the statute indicates the *there cannot be blanket presumptions of eligibility* for certain classes of participants. (*Southern Cal. Edison Co.*, 117 Cal. App. 4th at 1049.) Implicit in the language of the statute is the concept that eligibility for intervenor compensation in most situations must be determined on a case-by-case basis.[22] Even groups that have been found eligible numerous times must file a new NOI in each proceeding and must comply with the requirements set forth in Article 5 and the *Intervenor Compensation Order*, including specifically identifying how it meets to definition of customer. Therefore, I would have stricken the language in question.

E. Specific Problems with Order Denying Rehearing

I. Order Denying Rehearing Overrules Portions of the Intervenor Compensation Order but Fails to State Which Portions and Neglects to Give Notice and an Opportunity to be Heard to Parties to the Original Order Pursuant to Public Utilities Code §1708

The Order Denying rehearing contends that the Intervenor Compensation Order (D.98-04-059) is inconsistent with the statute: "to the extent that the [Intervenor Compensation] order is inconsistent with the Intervenor Compensation Statute, it will not control our decisions generally or this case specifically.

[22] Whether certain entities suffer such inherent conflicts of interest that their representation of customer interests is irretrievably compromised, thereby justifying a presumption *against* eligibility is a question best left for another proceeding.

Specifically, we do not intend to create new underground rules that will subvert the Legislature's intent to broaden customer participation at the CPUC." (Rehearing Order, p. 7)

This statement fails to state which portions of the Intervenor Compensation Order it overrules. To the extent that it does overrule portions thereof, it specifically violates Public Utilities Code §1708, which requires parties be given notice and an opportunity to be heard if a final Commission decision is to be altered or amended.[23] Since today's Order Denying Rehearing was considered in closed session, it could not be sent out for comment. This is to me an appalling breach of our notice requirements and one with which a majority of the commission apparently seems unconcerned.

II. The Order Denying Rehearing Wrongly States that Eligibility is not a Hurdle to Participation, in Contravention of Statute

The Order states: "The eligibility is not a 'hurdle' to participation. The focus of Commission proceedings is on the merits and policies proposed by utilities in their applications. It is fruitless to create hurdles to participation at an early stage of the proceeding, when the participation may prove to be valuable because it makes the required substantial contribution. The Statute does not permit it." (Rehearing Order, p. 7) The statute is clear. It *requires* certain hurdles. An explicit authorization in an organization's articles or by-laws[24] that permits such representation of the interests of customers is but one of such hurdles (notices of intent, estimates of compensation, estimates of duration of the proceeding, evidence of significant financial hardship, etc. are additional hurdles). Perhaps it ought not so require. It is not within our charge of authority to disregard statutes with which we disagree.

The Rehearing Order appears to state that the language in section 1804(b)(1) providing that " . . . the failure of the customer to identify a specific issue in the notice of intent or to precisely estimate potential compensation shall not preclude an award of reasonable compensation if a substantial contribution is made" means that the statute does not permit any procedural requirements or "hurdles" to participation at an early stage in this proceeding. (Rehearing Order, p. 3.) This analysis ignores section 1804(a), which lists the requirements a participant must meet in order to be deemed eligible for intervenor compensation.

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[23] Section 1708 states, in relevant part: "The commission may at any time, **upon notice to the parties, and with opportunity to be heard** as provided in the case of complaints, rescind, alter, or amend any order or decision made by it." (emphasis added)

[24] Public Utilities Code §1802(b)(1)(C) provides that "Customer" means "A representative of a group or organization authorized pursuant to its articles of incorporation or bylaws to represent the interests of residential customers, or to represent the interests of small commercial customers who receive bundled electric service from an electrical corporation."

The Rehearing Order attempts to use the above-quoted language to show that a participant does not need to demonstrate that it is a customer in its notice of intent to claim intervenor compensation ("NOI"). This interpretation is erroneous. The plain language of the statute specifies that in order to be deemed eligible for intervenor compensation, a participant must be a customer as defined in section 1802(b) of the statute. Contrary to the plain language of the statute, the Order Denying Rehearing indicates that a participant's customer status is not relevant to the Commission's eligibility determination.

The Rehearing Order states: *"Because D.03-12-058 was a decision issued at a preliminary state of the proceeding, it set out a number of paths for establishing eligibility that Local 483 might utilize as the proceeding continued.*[25] *The failure to definitely establish any one of them at the preliminary NOI state did not, and could not consistent with the statute, preclude compensation for participation that resulted in a substantial contribution. We affirm the discussion of the various paths to eligibility under Pub. Util. Code section 1802(b)."* (Rehearing Order, p. 4.) These statements are inaccurate.

The statute states that: "[a] customer who intends to seek an award under this article shall, within 30 days after the prehearing conference is held, file and serve on all parties to the proceeding a notice of intent to claim compensation . . . The notice of intent to claim compensation shall include both of the following: (i) A statement of the nature and extent of the customer's planned participation in the proceeding as far as it is possible to set it out when the notice of intent is filed. (ii) A statement of the nature and extent of the customer's planned participation in the proceeding as far as it is possible to set it out when the notice of intent is filed." (Pub. Util. Code, § 1804.) The statute permits "[i]n cases where the schedule would not reasonably allow parties to identify issues within the timeframe set forth above, or where new issues emerge subsequent to the time set for filing, the commission may determine an appropriate procedure for accepting new or revised notices of intent." (Pub. Util. Code, § 1804(a)(1).) These facts are not present in this case.

Thus, under the statute, if a participant does not file an NOI with the necessary information, and does not demonstrate that it is a customer consistent with the statute, such participant cannot be deemed eligible for intervenor compensation, regardless of whether it made a substantial contribution to the proceeding. The Rehearing Order seems to suggest that participants no longer need to be customers in order to be eligible for intervenor compensation; so long as they make a substantial contribution, they are eligible. If, in fact, this is the

[25] The "number of paths for establishing eligibility" that the Order refers to is the conclusion in D.03-12-058 that Local 483 is eligible as a Category 1, 2, and 3 customer.

standard, then virtually any entity could be deemed eligible for intervenor compensation, including shareholder representatives. Furthermore, the statute does not permit changing one's customer status, or making that determination at the end of the proceeding, unless one of the exceptions applies, a circumstance inapplicable here. Nor does the statute contemplate setting forth three separate "paths" to reach customer status during the proceeding. For these reasons, the Rehearing Order erred.

Moreover, the Rehearing Order's statement cited above conflicts with the *Intervenor Compensation Order*, which states: "When filing its Notice of Intent, a participant should state how it meets the definition of customer: as a *participant* representing consumers, as a *representative* authorized by a customer, or as a representative of a *group or organization* that is authorized by its bylaws or articles of incorporation to represent the interests of residential customers."[26] Local 483 did not provide this information in its NOI. As previously stated, the Commission cannot, without notice, overturn a portion of the *Intervenor Compensation Order* without violating section 1708. Furthermore, because D.03-12-058 did not purport to overturn any portion of the *Intervenor Compensation Decision*, this Order Denying rehearing appears to violate §1708, virtually inviting challenge.

III. Order Denying Rehearing Misinterprets Statute

The Order Denying Rehearing contains extensive discussions of the standards for statutory interpretation, which are inconsistent with current California law. (*See* Rehearing Order, pp. 4, 7-14.) If the language of a statute is clear, then one does not look to legislative history or to the tenets of statutory interpretation.[27] Specifically, in determining legislative intent, the Commission must look to the statutory language itself.[28] "If the language is clear and unambiguous there is no need for construction, and it is not necessary to resort to the indicia of the Legislature . . . .'"[29] Thus, it is only necessary to resort to statutory construction when the language of the statute remains unclear or ambiguous after its words are given a common sense meaning.[30] The Rehearing Order does not make the claim or set forth an analysis that the statute is ambiguous or unclear. On the contrary, the Order Denying Rehearing anomalously states that the Legislature was explicit in stating its intent in the statute. (Rehearing Order, p. 10.) Notwithstanding this clear statement, the Order

[26] D.98-04-059, 1998 Cal. PUC LEXIS 429 at *48-49 (italics in original).
[27] *De Anza Santa Cruz Mobile Estates Homeowners Assoc. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal. App. 4th 890, 909.
[28] *Id.*
[29] *Wilcox v. Birtwhistle* (1999) 21 Cal. 4th 973, 977.
[30] *Id.*

discusses the rules of statutory interpretation and includes extensive discussion of the legislative history of the statute, in contravention of California common law. If the Order cannot demonstrate that the statutory language of the statute is ambiguous or unclear, particularly with regard to the definition of customer, then the discussion of the legislative history of the statute and the rules of statutory interpretation on pages 4, 7-10, 13-14 is surplusage and should be stricken.

Even if it were appropriate to include a discussion of the legislative history of the statute, the Order does not provide citations to specific documents in some of this discussion. If the Commission decides to keep the legislative history discussion in the Order, then at the very least, citations need to be added to this discussion, particularly on pages 4, 8, and 14, if it is to be persuasive to a reviewing court.

The Order Denying Rehearing cites an outdated portion of Public Utilities Code § 1802(b) (p. 10). It states that "*the Legislature has amended the Intervenor Compensation State [sic] repeatedly without making any change to the definition of customer . . .*" (Order Denying rehearing p. 13). This is not true. Section 1802(b) was amended by Statutes 2003, Chapter 300, section 3. The 2003 amendments to Article 5 specifically targeted the format of the definition of customer. Before the changes, the three definitions of customer were listed in one paragraph.[31] The 2003 amendments clarified that there are three distinct definitions of customer by providing a separate paragraph for each definition. Had the Legislature intended the definition of customer to be as broad as adopted in the Order, it would not have included three distinct categories of customer in the Intervenor Compensation Statute. Thus, even if the definition of customer in the Intervenor Compensation Statute were ambiguous, its legislative history makes it clear that the purpose of the three definitions of customer is to limit who may be eligible for such compensation.[32]

III. The Order Denying Rehearing Failed to Address the Applicant's Failure to Comply with its Statutory Obligation to Provide Authorizing Bylaws or Articles

The Order Denying Rehearing states that to qualify as a Category 3 customer, a participant must "*provide a copy of its articles or bylaws, noting where in the document the authorization to represent residential ratepayers can be*

[31] *See* Pub. Util. Code, §§ 1801 – 1804 (Amended or Added by Stats. 1992, Ch. 942 (AB 1975); Stats. 1993, Ch. 590, § 135 (AB 2211); Stats. 2003, Ch. 300, § 2 (SB 521).)

[32] The California Supreme Court has found that Article 5 is the Commission's only source of authority to grant intervenor compensation awards. (*See Consumers Lobby Against Monopolies v. Public Util. Comm'n* (1970) 25 Cal. 3d 891, 911-912; *Southern California Gas Co. v. Public Util. Comm'n* (1985) 38 Cal. 3d 64, 66.)

found." (p. 11). Local 483 claimed that it was a Category 3 customer in its NOI. It did not provide a copy of its articles or bylaws, let alone noting where in the document the authorization to represent residential ratepayers was to be found. The Order does not address or cure this problem. Furthermore, while Local 483's and UWUA's bylaws may be considered a part of the record, it is unclear whether other parties in the proceeding received a copy of these documents.[33]

IV. The Order Denying Rehearing Cavalierly Dismisses SCE's Contentions

The Order Denying Rehearing does not fully address SCE's arguments. For example, the Order does not address SCE's arguments that Local 483 has not met the statutory standard for "significant financial hardship" or that the Commission has unlawfully presumed labor unions eligible for intervenor compensation. (SCE App. for Rehearing, pp. 10, 12.) It also does not address most of SCE's concerns that Local 483 does not qualify under any of the three definitions of customer set forth in the statute. (*See* Pub. Util. Code, § 1802(b).) In particular, the Order does not contain any discussion concerning SCE's arguments that Local 483 does not qualify as a Category 1 or 2 customer. Rather, the Order only states: *"[a]lthough the foregoing discussion of Category 3 status would be sufficient, D.03-12-058, also described in the manner in which Local 483 might establish customer status under wither Category 1 or Category 2. We confirm that discussion."* (Order Denying Rehearing, p. 14.)

With good reason, reviewing courts disfavor *post hoc* rationalizations by counsel as to an agency's reasoning. Because the Order relies on Local 483's status as a Category 3 customer, the language in D.03-12-058 concerning Local 483's status as a Category 1 or 2 customer is anomalous. In D.03-12-058, the Commission, for the first time, found that a participant qualified under all three definitions of customer. The determination that Local 483 is a Category 1 and 2 customer is very tenuous. Affirming Local 483's status as a customer under Category 1 and 2 unnecessarily affords additional grounds for questioning the reasoning underlying D.03-12-058.

There is some inappropriate language in the Order that bespeaks a partisanship unbecoming a Constitutional regulatory/adjudicatory agency with a long history of having been accorded deference by the appellate courts. For

[33] Neither Local 483's nor UWUA's organizational documents were attached to Local 483's NOI and Amended NOI. Local 483 sent these documents to the assigned administrative law judge ("ALJ"), and D.03-12-058 cited the web addresses for these documents. The web address to Local 483's Constitution on page 7, footnote 4 of D.03-12-058 is no longer valid; the web address to UWUA's Constitution on page 6, footnote 6 of D.03-12-058 is valid. It is not clear whether other parties to the proceeding received copies of these documents.

example, the words, *". . . SCE's operatic wail . . ."* is hardly an impartial voice. (Order, p. 4.)

Another concern with the Order Denying Rehearing is that there appears to be a misinterpretation of the statute and an ALJ Ruling concerning the discussion of why Local 483 qualifies as a Category 3 customer. It states that an ALJ Ruling[34] found the Natural Resources Defense Council ("NRDC") eligible for intervenor compensation in part because of a *"'presumption' in favor of eligibility that has been an established element of commission practice."* (Order, p. 12.) In fact, the ALJ Ruling provides that "[a] rebuttable presumption of eligibility exists for NRDC" pursuant to section 1804(b)(1), which states, in relevant part that "[a] finding of significant financial hardship shall create a rebuttable presumption of eligibility for compensation in other commission proceedings commencing within one year of the date of that finding." (ALJ NRDC NOI Ruling, pp. 8-9.) The Order relies on its misinterpretation in concluding that "*[t]he UWUA Constitution is certainly sufficient to invoke the presumption in favor of 'Category 3' customer status for Local 483, as a broad authorization to represent interests of residential ratepayers.*" (Order, p. 12.) This conclusion is unfounded because no presumption of eligibility for Local 483 pursuant to section 1804(b)(1) existed.

Lastly, the Order states that "*the Commission has for many years adopted an expansive approach to customer status determination utilizing various presumptions and assumptions in favor of associations and organizations that advance the public interest directly but represent narrowly defined 'ratepayer' or 'residential ratepayer' interests only indirectly."* (Order, p. 11.) To support this argument, it relies on the *Intervenor Compensation Order*[35] and the recent ALJ Ruling on NRDC's NOI in A.02-11-017, concluding that *" . . . the Constitution of UWAU, of which Local 483 is a subordinate body, compares favorably with the generalized language of NRDC Articles of Incorporation . . ."* (Order, p. 12.)[36]

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[34] ALJ Ruling Regarding Notice of Intent to Claim Compensation of NRDC, A.02-11-017, issued April 9, 2003.

[35] In various places, the Order Denying Rehearing relies on the *Intervenor Compensation Order* to support its arguments, and in other places, the Order Denying Rehearing disapproves of the *Intervenor Compensation Order*. (*See* Order, pp. 3-4, 11-12 in support of Intervenor Compensation Order; pp. 5-7 in opposition to *Intervenor Compensation Order*.)

[36] The Order Denying Rehearing also points to a decision cited in the *Intervenor Compensation Order*, and states that "*the Commission has consistently awarded compensation to Cal/Neva 'an association of community action agencies and community based organizations representing low income interests' even thought participation of government agencies might have disqualified it under other circumstances."* (Order Denying Rehearing, p. 12 (*quoting Intervenor Compensation Order*, D.98-04-059, 1998 Cal. PUC LEXIS 429 at *49, fn. 14).) The Commission cited the Cal-Neva decision in the *Intervenor Compensation Decision* in response to an argument that the Commission should not limit its compensation to representation of customer interests. (*Intervenor Compensation Order*, D.98-04-059, 1998 CAL PUC LEXIS 429 at *49, fn. 14.) The Commission affirmed its "previously articulated interpretation that compensation be proffered only to customers whose participation directly arises from their interests as

This is a faulty comparison. The ALJ Ruling that the Order Denying Rehearing cites determined that NRDC is a customer because it ". . . is organized to represent and advocate its members' interests in regulatory proceedings affecting natural resources. NRDC qualifies as a customer because it is an organization that is authorized by its articles of incorporation to represent the interests of ratepayers with a concern for the environment that distinguishes its interests from other intervenors." (ALJ NRDC NOI Ruling, p. 8.) The ALJ Ruling also states that "NRDC provided the relevant portions of its bylaws and articles of incorporation in its notice of intent. NRDC has approximately 30,000 dues paying members in PG&E's service territory, the majority of which are residential ratepayers." (ALJ NRDC NOI Ruling, p. 8, fn. 3.)

Contrary to the Order's contention, there is a clear difference between the ALJ ruling on NRDC's eligibility for intervenor compensation and the decision at hand. First, NRDC claimed that it is a Category 3 customer in its NOI. (A.02-11-017, NRDC NOI, p. 3, Feb. 26, 2003.) Local 483 did not state that it qualifies for intervenor compensation as a Category 3 customer in its NOI, but rather stated that it qualified as a Category 1 customer. Second, NRDC attached the relevant portions of its articles of incorporation and bylaws to its NOI, and cited the pertinent provision, that "'Individual membership in the Corporation shall constitute an authorization for the Corporation to represent members' interests in regulatory and judicial proceedings within the scope of the activities of the Corporation.'" (NRDC NOI, pp. 3-4 (*quoting* NRDC Amended and Restated By-Laws, § 1.02(a)).) Local 483 did not attach or cite to relevant provisions of its bylaws and articles of incorporation. Moreover, neither Local 483's nor UWUA's Constitutions contain explicit language authorizing it to represent its members in regulatory and judicial proceedings within the scope of the activities of their organizations.[37] Third, NRDC demonstrated that 30,000 of its members are residential customers of PG&E. (NRDC NOI, p. 4.) Local 483 did not make a claim that any of its members are residential customers of the utilities at issue in this proceeding.

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customers." (*Id.*) The Order does not substantiate its claim that the Commission has consistently awarded Cal-Neva intervenor compensation, and no direct citations to the Cal-Neva decision are provided.

[37] The Order relies on the following phrases from UWUA's Constitution in support of its argument that the language provides a sufficient nexus to Category 3 ratepayer representation: "workers and their families", "participat[ing] in our democratic society" and "work[ing] for social and economic justice." (Order, p. 12 (*quoting* UWUA Constitution).) The provisions of NRDC's Articles of Incorporation quoted in the Order are not relied on by NRDC or the ALJ Ruling in making the determination the NRDC qualifies for intervenor compensation as a Category 3 customer, and therefore, the parallels drawn by the Order are misplaced.

CONCLUSION:

For the aforementioned reasons, I would have had the Commission grant rehearing, vacate D.03-12-058, and replace it with a decision denying Local 483 eligibility for intervenor compensation.

I am saddened that the desire of a majority of my colleagues to increase participation in the regulatory process has compelled what I perceive as a manifest disregard of clear statutory obligations. Their desired result, wider participation, is something the could have been accomplished both through revision of existing internal Commission rules, *with notice and an opportunity to be heard*, as well as by seeking legislative change before our elected representatives in Sacramento. I fear that by taking this impermissible shortcut, my colleagues' action may have the effect of undermining the justifiable credibility that years of careful analysis by our Legal Division and Administrative Law Judges Division have earned. This Order Denying Rehearing is not a reflection of those divisions' derelictions in statutory interpretation. Rather, it derives from the commissioners' offices themselves.

There are many areas of the law in which interpretation is legitimately a matter of opinion. For the reasons outlined above in excruciating and boring detail, I do not see this as one of them. Regrettably, I believe that this Order Denying Rehearing irredeemably contravenes California law. As such, I am impelled to dissent from its reasoning.

/s/ Geoffrey F. Brown
Geoffrey F. Brown
Commissioner

San Francisco, California
October 7, 2004